State of Rhode Island and Providence Plantations

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Peter F. Kilmartin, Attorney General

October 30, 2013
PR 13-19B

Ms. Cynthia Boss

RE: Boss v. Woonsocket Superintendent's Office

Dear Ms. Boss:

This correspondence serves as a supplemental finding to Boss v. Woonsocket Superintendent's Office, PR 13-19, released August 28, 2013. In Boss, we reviewed your February 1, 2013 Access to Public Records Act ("APRA") complaint against the Woonsocket Superintendent's Office ("Superintendant's Office") and concluded that the Superintendent's Office violated the APRA when it failed to timely respond to your APRA request submitted on December 1, 2012. After responding to your request within the requisite ten (10) business day period and invoking an extension per Rhode Island General Laws § 38-2-3(e), the Superintendent's Office then failed to respond within the extended timeframe totaling thirty (30) business days. We allowed the Superintendent's Office an opportunity to explain why the gap between the date a response was due, January 15, 2013, and the date the Superintendent's Office responded, March 7, 2013, should not be considered knowing and willful, or reckless. As requested, the Superintendent's Office responded to our inquiry and we now resolve this outstanding issue.

By letter dated September 16, 2013, legal counsel for the Superintendent's Office, Richard R. Ackerman, Esquire, provided a response. Attorney Ackerman states, in pertinent part:

> The APRA does not define the knowing, willful or reckless conduct that it prohibits. Clearly, however, the Act distinguishes between the two.
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> The cited authorities clearly identify two types of violations. One type of violation results from mistake, inadvertence, or carelessness. A second type of violation requires more than mere oversight or inadvertence. It requires evidence that the violation was an effort on the part of a public official to shield official action from public scrutiny. Such a violation is committed in callous disregard for the welfare of the public in general, or for the interest of a citizen in particular.

In the cases cited in the August 28 ruling the actor manifested an intent to advance a personal interest, or to hide official action. In the instant case there is no evidence that the superintendent intended to advance her personal interest or to shield from scrutiny her actions as a public official. The superintendent believed she was required by the APRA to send the thirty-seven letters to the complainant. Despite the ruling that the thirty-seven letters need not have been sent, the effort by the superintendent, albeit untimely, does not reflect the type of mindset which the cited authorities characterize as knowing, willful or reckless conduct.

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...There is no evidence the superintendent was cognizant of 'an appreciable possibility' of violating the law. Although she was aware of the APRA (her earlier response was timely), there is no evidence to suggest that her second, untimely response was motivated by personal gain nor did others counsel her differently to no avail, nor was there an action that she failed to take in mitigation, similar to the DiPrete failure to file a conflict statement. Here her second response was late. A violation of the APRA is acknowledged. It is respectfully asserted, however, that the type of conduct found in DiPrete to conclude that a knowing, willful, reckless violation occurred is lacking here.

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...There is no evidence of a deliberate consciousness by the superintendent to untimely produce records she erroneously thought may have been responsive to the request but, nevertheless, in reckless disregard of duty she withheld for two months. To the contrary, her failure falls clearly outside the scope of the court's definition of one who violates the law knowingly, willingly or recklessly. The superintendent's actions in handling the two requests for documents submitted by the Complainant fairly indicate that her untimely response to the second request was occasioned by inadvertence, mistake, or other innocent reason.

...The evidence suggests that the failure to respond to the second request in timely fashion was unintentional, as opposed to an intentional act, i.e., knowing, willful, reckless.

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The August 28 ruling expresses a concern that in the future public officials may seek to excuse a violation of the APRA by citing an overburdened workload resulting from a 'confluence of events,' or by proclaiming that they acted in good faith. The superintendent's references to her good faith or the burdensome circumstances in which she found herself as she assumed the position of Woonsocket superintendent are not posited as excuses for untimely compliance with the APRA. Rather, they are offered as evidence that the superintendent was not engaged in a conscious effort to violate the law for personal interest or gain or to avoid scrutiny for her actions.

By letter dated September 10, 2013, you filed a supplemental response and stated, in pertinent part:

6. The timing of when Dr. Donoyan finally delivered the documents that I requested – on March 7, 2013 – shows willful and knowing behavior.

   Dr. Donoyan finally sent me the documents I had requested on March 7, 2013, which was after my termination had been decided by the Woonsocket School Committee on February 13, 2013, and finalized by the Woonsocket Budget Commission on February 26, 2013. By the time I received the evidence I needed from Dr. Donoyan, just a little over a week later, it was too late.

7. The Superintendent was aware of the APRA requirements and she knowingly chose to not follow them.

   As indicated in Footnote 8 of your decision letter, the fact that the Superintendent used the wording 'good faith effort' shows she had knowledge of the APRA law; yet she deliberately chose to ignore its requirements by delaying her response to me by two months (January 15, 2013 – March 7, 2013).[1]

Our focus is whether the Superintendent's Office knowingly and willfully, or recklessly, violated the APRA. We first analyze whether the Superintendent's Office committed a knowing and willful violation. The Rhode Island Supreme Court examined the "knowing and willful" standard in Carmody v. Rhode Island Conflict of Interest Comm'n, 509 A.2d 453 (R.I. 1986). In Carmody, the Court determined that:

> the requirement that an act be 'knowingly and wilfully' committed refers only to the concept that there be 'specific intent' to perform the act itself, that is, that the act or omission constituting a violation of law must have been deliberate, as contrasted with an act that is the result of mistake, inadvertence, or accident. This definition makes clear that, even in the criminal context, acts not involving moral turpitude or acts that are not inherently wrong need not be motivated by a wrongful or evil purpose in order to satisfy the 'knowing and wilful' requirement. See id. at 459.

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[1] You also filed another response dated September 18, 2013, wherein you asked this Department to find the Superintendent's Office in violation "because Mr. Ackerman did not comply with the 10-business-day deadline for filing this response with your office[]." You further state that "[i]f an extension were to be granted by your office[]...it should have been offered openly and at the same time to both parties." It is within this Department's discretion to grant extensions with respect to filing a response with our Department when such extension is requested. In this instance, Attorney Ackerman requested an extension, which was granted. Since you did not request an extension, one was not granted to you.

In a later case, DiPrete v. Morsilli, 635 A.2d 1155 (R.I. 1994), the Court expounded on these Carmody principles, and:

> has held that when a violation of the statute is reasonable and made in good faith, it must be shown that the official 'either knew or showed reckless disregard for the question of whether the conduct was prohibited by [the] statute * * * Consequently an official may escape liability when he or she acts in accordance with reason and in good faith. We have observed, however, that it is 'difficult to conceive of a violation that could be reasonable and in good faith. In contrast, when the violative conduct is not reasonable, it must be shown that the official was 'cognizant of an appreciable possibility that he [might] be subject to the statutory requirements and [he] failed to take steps reasonably calculated to resolve the doubt.' (internal citations omitted). Id. at 1163-64.

Our finding is limited to whether the untimely response by the Superintendent's Office was willful and knowing, and our inquiry concerns whether the City was "cognizant of an appreciable possibility that [it might] be subject to the statutory requirements and [it] failed to take steps reasonably calculated to [address the issue]." See DiPrete, 635 A.2d at 1164. For the purposes of our analysis, it is important to recount the facts underlying your initial complaint. You first made an APRA request on November 19, 2012 for certain documents of the Woonsocket Pool Board from June 1, 1996 through November 19, 2012. Within ten (10) business days from this first request, you received certain documents from the Superintendent's Office. While there was an issue whether the Superintendent's Office addressed the full scope of your APRA request, this Department determined that there was no evidence that any responsive documents were withheld and thus there was no violation with respect to the response to your November 19, 2012 APRA request.

Your second APRA request dated December 1, 2012, which is the subject of this supplemental finding, again requested those same certain documents pertaining to the Pool Board, plus additional documents. Within ten (10) business days from this second request, the Superintendent's Office extended the time to respond to this request by twenty (20) additional business days, for a total of thirty (30) business days from the date of your APRA request. The Superintendent's Office, however, failed to provide a response by January 15, 2013, within that thirty (30) business day timeframe. In fact, the Superintendent's Office did not provide a response to you until March 7, 2013, over seven (7) weeks from when a response was due. In fact, you did not receive a response until the Superintendent's Office responded to this Department regarding our investigation.[2]

Complying with this Department's request that the Superintendent's Office provide a response explaining the six week lapse of time from the date a response was due, January 15, 2013, and

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[2] In our previous finding, Boss v. Woonsocket Superintendent's Office, PR 13-19, we deemed the records ultimately provided to you nonresponsive for the reasons stated in that finding. There was no evidence that the Superintendent's Office possessed documents responsive to your request.

the date the Superintendent's Office responded, March 7, 2013, Attorney Ackerman argues that the "superintendent's actions in handling the two requests for documents submitted by the Complainant fairly indicate that her untimely response to the second request was occasioned by inadvertence, mistake, or other innocent reason." Attorney Ackerman further argues that "there is no evidence that the superintendent intended to advance her personal interest or to shield from scrutiny her actions as a public official." Respectfully, while we do not doubt the veracity of this statement, the knowing and willful standard is not whether a public body advances its own interest or intends to shield its actions from public scrutiny. The standard is whether the public body was "cognizant of an appreciable possibility that [it might] be subject to the statutory requirements and [it] failed to take steps reasonably calculated to [address the issue]." See id..

This Department recently released a supplemental finding, Law Offices of Michael Kelly v. City of Woonsocket, PR 13-13B, wherein we filed a lawsuit based upon a knowing and willful violation. There, we found that the City committed a knowing and willful violation of the APRA when it failed to timely respond to Attorney Kelly's APRA request dated December 21, 2012.[3] The City represented it saw the APRA request on January 2, 2013 and extended the time within ten (10) business days. The City further acknowledged that a response to said APRA request was due on February 13, 2013, but failed to provide documents until April 2, 2013. The City offered no defense to its lack of a timely response other than it being "short-staffed." We found that, without more, the argument that the City was "short-staffed" is not enough to overcome the knowing and willful standard. This Department ultimately found that the City knowingly and willfully violated the APRA when it failed to timely respond to Attorney Kelly's APRA request.[4]

Here, it is our opinion that the facts at hand cannot be distinguished from those facts underlying the lawsuit in Law Offices of Michael Kelly. The Superintendent's Office received your APRA request dated December 1, 2012. On December 5, 2012, the Superintendent's Office extended the time to respond an additional twenty (20) business days. A response was due by January 15, 2013. You did not receive a response until March 7, 2013. Absent a "confluence of events" and lack of intent, the Superintendent's Office has offered no further evidence as to why its response was untimely. The fact that the Superintendent's Office timely responded to Ms. Boss's first APRA request dated November 19, 2012, and further extended the time period to her second APRA request dated December 1, 2013 within the requisite time period show that not only was the Superintendent's Office aware of the APRA requirements, but that it is capable of

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[3] We also found that the City knowingly and willfully violated the APRA when it failed to provide a response to Request No. 8 of Attorney Kelly's APRA request.

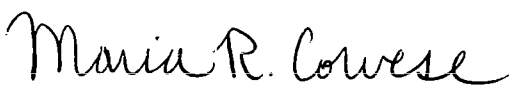
[4] We also considered the City's three prior violations and a 2009 lawsuit filed by this Department against the City for failing to timely respond to an APRA request in determining the outcome of our finding. We acknowledge that this is the first violation against the Superintendent's Office, and that this Department has never filed a lawsuit against it. We observe, however, that this Department has never adopted an interpretation or practice that a public body that violates a particular APRA or Open Meetings Act provision for the first time cannot be found to have committed a knowing and willful violation, and such an interpretation is inconsistent with Carmody and DiPrete.

compliance. Further, the "confluence of events" cited in the Superintendent's affidavit as reason for the untimely response was in effect when the Superintendent's Office received Ms. Boss's November 19, 2012 APRA request, at which time such "events" did not prevent the Superintendent's Office from timely responding.

Based upon the evidence presented, as well as this Department's most recent precedent in Law Offices of Michael Kelly, PR 13-13 and PR 13-13B, we find that the Superintendent's Office knowingly and willfully violated the APRA when it failed to provide a timely response to your December 1, 2012 APRA request.[5] Accordingly, this Department will file a civil lawsuit against the Superintendent's Office.

We thank you for your interest in keeping government open and accountable to the public.

Very truly yours,



Maria R. Corvese
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MC/pl

Cc: Richard A. Ackerman, Esquire

[5] Since we conclude that the actions of the Superintendent's Office amount to a knowing and willful violation, we need not reach whether those actions were reckless.